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No. 90-1448

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KENNETH ROBERTS,
Petitioner,
v.
KATHLEEN MADIGAN and ADAMS COUNTY SCHOOL DISTRICT NO. 50,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Does the Establishment Clause require a public school to censor a fifth-grade classroom library by banning, from among some 240 volumes, the two books *The Bible in Pictures* and *The Story of Jesus?*

2. Does the Establishment Clause require a public school to censor the personal reading selections of a fifth-grade teacher by forbidding him to read the Bible discreetly and silently to himself during a 15-minute silent reading period in the classroom?

3. Does the Establishment Clause require a fifth-grade public school teacher to hide the Bible in his desk during school hours instead of leaving the Bible among other volumes on his cluttered desk top?

4. Did the public school principal and school district violate the neutrality requirement of the Establishment Clause by ordering a fifth-grade teacher to: a) remove two allegedly Christian books from his classroom library of some 240 volumes; b) stop reading the Bible discretely and silently to himself during a silent reading period; and c) hide the Bible in his desk during school hours?

5. Did the public school principal and school district violate the rights of a fifth-grade teacher to free speech and academic freedom under the First Amendment by ordering him to: a) remove two allegedly Christian books from his classroom library of some 240 volumes; b) stop reading the Bible discreetly and silently to himself during a silent reading period; and, c) hide the Bible in his desk during school hours?

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Constitutional Provisions

U.S. Const. amend. I ..... 1, *passim*

INTRODUCTION

This petition for certiorari poses the question whether the Establishment Clause absolutely forbids from the public school classroom the mere presence of the Bible or accounts of events recorded in the Bible. The specific constitutional questions presented are straightforward, substantial, and unsettled. Respondents disagree, in their Brief in Opposition, with the merits of petitioner's legal arguments. But disagreement between the parties on the merits of a case—a circumstance present in all litigation—does not provide a reason for denying review.

Respondents boldly claim that petitioner "essentially concedes" that the decision below "follows precedents" of this Court. Brief in Opp. at 10. Petitioner's argument, however, is precisely the opposite: the court of appeals has applied the Establishment Clause in this case in a novel manner that runs *contrary* to the principles embodied in the precedents of this Court.

Respondents ignore the fact that this Court has already granted review on very similar constitutional issues in the case of *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991). In the face of *Lee*, respondents cannot seriously argue that the issues surrounding the application of the Establishment Clause to the public school setting are not worthy of Supreme Court review.

STATEMENT OF THE CASE

The crucial facts in this case are not in dispute. *See* Pet. at 2-7. In light of respondents' attempt to recharactreize the facts, however, *see* Brief in Opp. at 1-5, a brief review of certain key facts is appropriate.

Petitioner Kenneth Roberts, a fifth-grade teacher in the public school system, taught reading to his students. Pet. at 3. Part of this instruction included a 15-minute *silent* reading period. *Id.* During this period, students were free to read books *of their own personal choosing*. *Id.* These books could come from home, from the school library, or from a collection of some 240 books kept in a

classroom collection (the "classroom library"). *Id.* *None* of the countless volumes available to the students necessarily had even the slightest connection to any *other* fifth-grade course, i.e., aside from reading. Tr. 64-65. *All* of these optional reading books, however, *as books*, served as a means of helping students learn to read.[1]

While the students read silently, Roberts would also read *silently* (respondents repeatedly omit this crucial detail) from various books, none of which necessarily had any relation to any curricular matters. Pet. at 5.

Of all of the books available to the students for optional silent reading—from home, from the school library, and from the classroom library—the respondent school principal singled out and banished two books from the classroom library: *The Bible in Pictures* and *The Story of Jesus*. Pet. at 4. Of all of the books available for personal, silent reading by teacher Ken Roberts, the principal singled out one book for banishment from his desk top: the Bible.[2] Pet. at 5-6. The stated reason for both of these acts of censorship was the same: "separation of church and state." Pet. at 4, 6.

At issue in this case, Pet. at 13-24, is the propriety of the principal's extreme "separationist" interpretation of the Establishment Clause of the first amendment.

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[1] Respondents claim that Roberts has "never provided a legally permissible reason" for the use of the challenged books in the classroom library. Brief in Opp. at 3. Surely respondents do not claim that the use of optional reading books to practice reading is illegal.

[2] Principal Madigan objected to Roberts's reading the Bible but did not object to his reading of a book on the life of Buddha. Tr. 34, 65, 68. Respondents attempt to explain away this discriminatory double-standard by claiming that reading about Buddha was excusable because "the class was working on an historical time line," *see* Brief in Opp. at 2. This explanation is absurd: the Bible, with its recounting of significant historical events over thousands of years, is as much or more relevant to a historical time line as is the life of Buddha.

I. IN LIGHT OF THE DECISION OF THIS COURT TO GRANT REVIEW IN *LEE v. WEISMAN* (U.S. NO. 90-1014), WHICH RAISES CONSTITUTIONAL ISSUES THAT DUPLICATE ISSUES IN THE CASE AT BAR, THIS COURT SHOULD EITHER GRANT REVIEW OR HOLD THE PRESENT PETITION PENDING DISPOSITION OF *LEE v. WEISMAN*.

This Court granted review, after the filing of the present petition, in a case presenting very similar constitutional issues. *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991). This Court should therefore either grant the present petition and consider the case at bar simultaneously with *Lee v. Weisman*, or, in the alternative, hold the present petition pending disposition of *Lee*, and then either grant plenary review or grant the petition, vacate the judgment below, and remand this case for further consideration in light of the decision in *Lee*.[3]

The petition for certiorari in the present case raises the question whether the first amendment requires public school officials to forbid the mere passive presence of three books in a public school classroom: the Bible, *The Bible in Pictures*, and *The Story of Jesus*. Resolution of this case depends upon interpretation of the religion and speech clauses of the first amendment to the United States Constitution. *See* Pet. at i (questions presented). Of particular relevance is the status, and scope, of the three-part *Lemon* test for determining whether official action violates the Establishment Clause. *See Lemon v. Kurtzman*, 403

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[3] This Court regularly employs the technique of deciding one case, and then disposing of pending petitions for certiorari in other cases raising related issues by granting the petitions, vacating the judgments below, and remanding for further consideration in light of the decision of the first case. Instances of this practice are legion. Examples are found in the orders reported at 487 U.S. at 1229-30 (1988) (granting petitions in ten separate cases, vacating the judgments below, and remanding for further consideration in light of eight assorted decisions on the merits).

U.S. 602, 612-13 (1971). *See also* 921 F.2d at 1053-58 (App. 12a-17a, 19a-22a) (application of *Lemon* test by court of appeals); 702 F. Supp. at 1512, 1514-17 (App. 43a-44a, 49a-56a) (application of *Lemon* test by district court). Also of central importance is the question whether, and to what degree, direct or indirect government coercion is necessary to trigger a violation of the Establishment Clause. *E.g.*, 921 F.2d at 1053 (App. 12a) (this case presents "the difficulty of determining the proper balance between the freedom from *religious coercion* created by state-sponsored religion and the inescapable reality that our culture is permeated by religious symbols and rituals") (emphasis added).

These same constitutional issues are currently before this Court in the pending case of *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991). The *Lee* case involves the permissibility, under the Establishment Clause, of a clergy invocation at a public school graduation ceremony. The questions presented in *Lee* are the following:

> (1) Do school authorities violate Establishment Clause by allowing speaker at a public school or high school graduation ceremony to offer invocation and benediction that acknowledge deity?
>
> (2) Is direct or indirect government coercion necessary element of Establishment Clause violation?

This Court's disposition of the *Lee* case will obviously have very significant implications for the present litigation. The decision in *Lee* will likely provide a clarification, and possibly a revision, of the *Lemon* test. In addition, *Lee* will likely clarify the status and meaning of the "endorsement" test articulated by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688-92 (1984) (concurring opinion), as well as the scope of permissible "accommodation" of religion.

In short, the forthcoming decision of this Court in *Lee v. Weisman* should provide the most recent, authoritative statement on the meaning of the Establishment Clause in

the context of the public schools. Given that the present case also involves, first and foremost, the application of the Establishment Clause to the public school setting, resolution of the case at bar should not be divorced from the pending *Lee* case.

This Court should therefore either grant review in the present case, in order to allow for consideration of this case in conjunction with *Lee v. Weisman*; or, in the alternative, this Court should hold the present petition pending disposition of *Lee*, and thereupon either grant plenary consideration of the present case or simply grant the petition, vacate the decision of the Tenth Circuit, and remand this case for further consideration in light of the decision of this Court in *Lee v. Weisman*.

II. THE DECISION OF THE COURT BELOW RESTS UPON AN EXTREME MISINTERPRETATION OF THE ESTABLISHMENT CLAUSE.

As explained in the petition for certiorari, the decision of the court of appeals in the case at bar adopts an extremist view of "separation of church and state"—a view that, in the present case, "insisted on the *obliteration* of all Christian books from the school premises." 921 F.2d at 1063 (App. 32a) (Barrett, J., dissenting).

Respondent school officials have not attempted to explain away the extreme "separationist" view of the court of appeals; instead, these officials embrace this view and argue that the Constitution compels such a stance.

In essence, the school officials have adopted a position of constitutional despair; finding themselves unable to draw a distinction between unconstitutional *indoctrination* and constitutional *education*, these officials resort to a categorical prohibition on all mention of God or Judeo-Christian history in the classroom.

The school officials deny that they have adopted a *per se* rule against the mere presence in the classroom of any books that mention God or portray historical events or

figures with religious significance. *See* Brief in Opp. at 14 (books in the classroom library); *id.* at 18 (books on the teacher's desk). But the clear import of the officials' arguments, and of the decision below, is that all "religious" books and ideas must be expelled from the public school classroom.

The record provides no warrant for concluding that Ken Roberts used the challenged books for proselytization or indoctrination. Pet. at 4-7. Roberts neither steered the children in their selection of reading materials, Tr. 24, nor read aloud or alerted students when he read the Bible to himself, Tr. 32-33. The principal, moreover, made no inquiry regarding the use of these books. Pet. at 4, 6. The condemnation of the three challenged books—a condemnation which the court below affirmed—therefore amounts to a *per se* objection to the mere presence of these books. *See* 921 F.2d at 1058 (App. 21a) ("placement" of the books in the classroom violated the Establishment Clause).

The school officials persist in embracing this *per se* rule of exclusion. These officials take issue with the "availability" of the challenged books, Brief in Opp. at 14, charging that the mere "placement" of these books in the classroom was unconstitutional, *id.* The officials equate the mere presence of the Bible on Robert's desk [4] and his silent "personal reading" with unconstitutionally "*teaching* religion," *id.* (emphasis in original). The officials state that the mere presence of these books "endorsed" Christianity, and that making these books "available" is objectionable. *Id.* at 16. Ironically, the school officials find fault with the "*lack* of use of the books or the Bible," *id.* at 12 (emphasis added),

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[4] Respondents misleadingly refer to "display" of the Bible. There is no evidence that Roberts "displayed" the Bible. On the contrary, Roberts always had various papers and "at least five or six books" on his desk, Tr. 32, 34, 65-66; the Bible was not "prominently displayed"—indeed, as Roberts testified, "Half the time I couldn't find it. . . . My desk is pretty cluttered with papers and books and lesson plan books, and pencils and many other things." Tr. 66.

yet deny that they are applying a "*per se* rule," *id.* The officials equate the *availability* of information with "indoctrination," *id.*, and with "teaching," *id.* at 19, 23. The officials demand that Roberts "conceal" the Bible, *id.* at 4, 21, and charge that merely "allowing the teacher to have" the challenged books in the classroom "as supplemental reading materials" is illegal and unconstitutional, *id.* at 21-22.

A. Curricular vs. noncurricular books

The respondent school officials rely heavily upon an asserted distinction between "curricular" and "noncurricular" books. *See* Brief in Opp. at 2, 13-15, 18, 20, 22. This distinction lacks constitutional significance.[5]

The Establishment Clause does not classify the use of books as curricular or noncurricular; nor is it at all obvious whether a supplemental reading list—which is what, in essence, the classroom and school libraries are—is or is not a part of the reading curriculum.[6] Furthermore, if the Constitution forbids *allowing* a student to read the Bible, it is very difficult to see why it would not also forbid *requiring* that student to read the same book as part of a compulsory course of "curricular" instruction. Yet this Court has repeatedly approved the use of the Bible—or other texts with religious significance—as part of a regular course of public school study. *See* Pet. at 13-14 (citing cases). It follows logically that such books

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[5] This distinction also lacks a basis in the record. The principal banished the Bible, *The Bible in Pictures*, and *The Story of Jesus* from the classroom "because of separation of church and state," Tr. 28, 120; Brief in Opp. at 3, and "[t]o avoid the appearance of teaching religion," App. 65a (Ex. 12), *not* because these books were "noncurricular." Indeed, it would have been absurd to evict these volumes as "noncurricular" while allowing a multitude of other "noncurricular" books—everything from *Fog Magic* to *Charlie Brown's Cyclopedia* to *Events that Shook the World*—to remain in the classroom. *See* Tr. 64-65 (other books were not curriculum-related); App. 68-70a (listing volumes in classroom library).

[6] Resting constitutional decisions upon the elusive distinction between 'curricular" and "noncurricular" materials would create a litigation nightmare.

are not inherently "dangerous," and that students may be permitted to read them voluntarily either for independent study or purely for the sake of practicing reading.

The crucial constitutional distinction is between *indoctrination*—which is forbidden—and *education* (i.e., the neutral provision or explanation of information)—which is permitted. Whether a teacher improperly proselytizes in a course designed for that purpose ("curricular") or while keeping miscreants after school ("noncurricular") is constitutionally irrelevant. And whether a Bible is properly assigned in a comparative religion course ("curricular") or simply made available for personal selection from a collection of over 200 books ("noncurricular") is likewise irrelevant.

B. Religious vs. nonreligious books

The censorship the school officials claim is constitutionally necessary would require school administrators—and courts—to identify which books are "religious." The unworkability of such a rule appears in the case at bar.

The undisputed testimony in this case was that the classroom library contained books on Greek mythology and on Indian religion. Tr. 51. *Accord* 921 F.2d at 1055 (App. 15a). Roberts took the view that these were "religious" books, *id.*, and that other books in the classroom library also had "religious" contents reflecting a variety of religions. *See* Tr. 51, 64, 140-42. The school itself categorized a variety of books on "religion and mythology" together in the school library. Tr. 97 (testimony of school librarian). Yet when the principal undertook to enforce "separation of church and state" in Roberts's classroom, she "ignored the presence of books dealing with Greek gods and goddesses and American Indian religions." 921 F.2d at 1055 (App. 15a). The district court and court of appeals also ignored the presence of these other books and declared that *The Story of Jesus* and *The Bible in Pictures* were the only religiously oriented books in the classroom library. 921 F.2d at 1057 (App. 21a); 702 F. Supp. at

1513 (App. 47a). Respondents enthusiastically embrace this selective definition of religion. Brief in Opp. at 2, 21.

Are courts, then, competent to decide that Greek mythology has lost its status as a religion, presumably because of a lack of adherents? May a federal court assume, as the district court did, the authority to dismiss "the tenets of a little known religion such as those followed in American Indian culture," as "far less influential on young students" and therefore not a religion for purposes of the Establishment Clause? *See* 702 F. Supp. at 1517 (App. 56a). If so, are teachers free to try to indoctrinate these "little known" beliefs?

Respondent Madigan, when asked whether "religious books" have no purpose in a public school classroom, agreed that "[c]ompletely religious books, *Christian* completely religious books like the ones [at issue]," did not belong in a classroom. Tr. 143 (emphasis added). The rule of this case, then, is that the strictures of the Establishment Clause only apply to "a modern day, widely observed religion which is a recognizable part of our society." 702 F. Supp. at 1517 (App. 56a).

But that is not the rule under the precedents of this Court. A teacher may no more try to indoctrinate paganism than Presbyterianism. It is the *effort to proselytize* that unconstitutionally threatens the trust parents repose in school officials, *see Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting the "understanding that the classroom will not *purposely* be used *to advance religious views*") (emphasis added); the popularity of the religion in question is immaterial.

C. Classroom vs. school library

The school officials' rule of absolute censorship would also necessarily apply to the school library (as principal Madigan's alleged removal of the Bible from the school library would indicate, *see* Pet. at 7).

The school officials do not attempt to forge an exception, under their *per se* rule of exclusion, for school

libraries. Nor would such an exception be consistent with the theory of the school officials, which treats "religious" books as inherently harmful.

If the very *presence* of the challenged books within the grasp of fifth grade students is, as the court of appeals held, unconstitutional, then these books are the constitutional equivalent of asbestos or radioactive waste—which cannot be countenanced in either the classroom *or* the school library. If the very *presence* of the Bible on Roberts's cluttered desk top violates the Constitution because students might notice the book, then it must also be unconstitutional to maintain this dangerous volume in the school library. According to respondents, schools must be certain, as principal Madigan testified, that students do not get the impression that "reading a Bible . . . was something that they might do [or] that was appropriate for them to do." Tr. 150; *see also* Brief in Opp. at 4.

In short, the decision below rests on the extreme view that the Bible and other texts describing events or people with religious significance are absolutely forbidden from public school classrooms *and* libraries. This Court should grant the petition for certiorari in this case to review this outlandish interpretation of the Establishment Clause.

CONCLUSION

This Court should grant the petition for certiorari or, in the alternative, should hold this petition pending disposition by this Court of the case of *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991), and thereupon either grant plenary review or grant the petition, vacate the decision of the court of appeals, and remand for further consideration in light of the decision of this Court in *Lee v. Weisman*.

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